FILED
JUL 20 1999
OF THE CLERK

No. 98-822

In the Supreme Court of the United States

OCTOBER TERM, 1998

FRIENDS OF THE EARTH, ET AL.,
PETITIONERS,

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,
RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE STATE OF SOUTH CAROLINA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

CHARLES M. CONDON
Attorney General for the State of South Carolina

KENNETH P. WOODINGTON
Counsel of Record
Senior Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3680
Counsel for Amicus Curiae, State of South Carolina

BEST AVAILABLE COPY

TABLE OF CONTENTS

INTEREST OF AMICUS 1

STATEMENT 2

SUMMARY OF ARGUMENT 6

ARGUMENT 9

I. The Role of Citizen Suits Under the Clean Water Act is Limited. 10

II. The State of South Carolina, Not the Citizen Suit, Played The Pivotal Enforcement Role. 13

A. History of State Agency Enforcement 13

B. Commencement of the Citizen Suit 14

C. The Trial Court Refuses to Dismiss the Complaint 15

D. The Trial Court Denied Injunctive Relief, But Imposed Additional Civil Penalties 18

E. Reversal by the Court of Appeals 20

CONCLUSION 21

TABLE OF AUTHORITIES

Arkansas Wildlife Federation v. ICI Americas Inc., 842 F. Supp. 1140 (E.D. Ark. 1993), *aff'd*, 29 F.3d 376 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1094 (1995) 16

Conn. Fund for Environment v. Contract Plating Co., 631 F. Supp. 1291 (D. Conn. 1986) 16

Connecticut Coastal Fishermen's Association v. Remington Arms Co., 777 F. Supp. 173 (D. Conn. 1991), aff'd in part and rev'd in part, 989 F.2d 1305 (2d Cir. 1993) 17

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 890 F. Supp. 470 (D.S.C. 1995) 10, 15, 16, 17

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 956 F.Supp. 588 (D.S.C. 1997) 3, 4, 5, 13, 14, 18, 19, 20

Gwaltney v. Chesapeake Bay Foundation, 48 U.S. 49 (1987) 8, 10, 11, 12, 13, 14

PIRG v. Powell Duffryn Terminals Inc., 913 F.2d 64 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991) 17

Steel Co. v. Citizens for a Better Environment, 118 S. Ct. 1003 (1998) 11, 19, 20

Supporters To Oppose Pollution, Inc. v. Heritage Group, 973 F.2d 1320 (7th Cir. 1992) 17

STATUTES

33 U.S.C. § 1365(b)(1)(A) 8, 10

33 U.S.C. § 1365(b)(1)(B) 11, 15

S. Rep. No. 92-414, at 64 (1971) 8, 12

In the Supreme Court of the United States

OCTOBER TERM, 1998

FRIENDS OF THE EARTH, ET AL.,
PETITIONERS,

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,
RESPONDENT.

BRIEF FOR THE STATE OF SOUTH CAROLINA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS

The State of South Carolina has a unique interest in this case. Neither the agencies of the State nor persons doing business in the state should be subject to protracted federal litigation once compliance with environmental protection standards has been attained through administrative measures and state court consent decrees. Although the State is not a party to this case, South Carolina's environmental protection agency played a central role in the pre-litigation phase, and later found itself defending its actions in federal court after entry of the consent decree and long after respondent had fully complied with its NPDES permit.

STATEMENT

This case arises out of efforts to regulate the mercury level in the water discharges from an incinerator which the respondent operated from the late 1980's through September 1998. The history of the respondent's discharges, and of the varying standards which applied to them, is set forth in the trial court's opinions. The relevant standards are summarized below:

EPA standard since 1993 (or earlier)	200.0 ppb[1]
Standard applied to respondent by State, 1988-1993	1.3 ppb
Standard applied to respondent by State, 1993-1998 (plant closed in 1998)	10.0 ppb
Standard for drinking water	2.0 ppb
Discharges in excess of 10 ppb (new standard), 1991-92	14
Discharges in excess of 10 ppb (new standard), 1993-1995[2]	0

[1] Parts of mercury per billion.

[2] 1995 is the last year for which information is in the record.

As the above history indicates, *hindsight indicates that there has never been a substantial problem with compliance with the standard ultimately applied to this facility*. The standard which the State applied to the respondent in this case from 1988 through 1993 or 1994 was 1.3 ppb. EPA concluded in 1993 or earlier that much higher mercury levels (200 ppb) would be adequate to protect the environment. To put this in context, the standard for drinking water is 2 ppb. As a result, the State's initial permit limit was so strict that it required the respondent's discharge at the pipe, even before diluted by the river, *to contain 25% less mercury than is permitted in drinking water*. Even the State's revised standard, which began to apply in 1993, was only 10 ppb, one-twentieth the number which EPA has found acceptable.

Plaintiffs point to 489 occasions where the respondent's discharges exceeded the standard in effect at the time of monitoring. However, an examination of the detailed chart in the district court's opinion, *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 956 F. Supp. 588, 613-621 (D.S.C. 1997), shows that only 40 of those occasions involved a discharge in excess of 10 ppb, the standard which DHEC ultimately applied to this discharge permit. Only 14 of these 40 excursions occurred in 1991 or 1992, by which time the state environmental agency had been closely involved with the respondent's compliance for several years; the remaining 26 excursions occurred in the late 1980's. Respondent's operation never made a discharge which was anywhere close to the limit of 200 ppb which is an allowable daily maximum under the revised EPA Gold Book. Only four of respondent's discharges over the years were over 30 ppb, and no

discharge was as high as 40 ppb.

The measured water quality of the North Tyger River reflects the minuteness of the amounts of mercury discharged. The district court concluded that various studies conducted by the state agency and by the respondent all showed "that Laidlaw's actual discharges have [not] resulted in harm to the North Tyger River." 956 F.Supp. at 603. Far from resulting in harm, the discharges were so low that, as the district court held, "no fish in the river has a mercury level even one-quarter of a limit that is ten times lower than necessary to protect human health." *Id.* In other words, even if the mercury level in fish in the river had been 40 times higher than what was measured, it still would not have exceeded the level above which human health might be affected. As a result of these findings of fact, the district court concluded that "Laidlaw's effluent, even with the permit exceedances it has experienced, has had no demonstrated adverse effect on the environment." *Id.*

Despite the State's imposition of an exceedingly strict mercury discharge standard, both originally and as amended, the district court still concluded that the state environmental agency was not "diligently prosecuting" an enforcement action against Laidlaw. The agency thus managed to attain the singular distinction of appearing both too stringent and too lenient at the same time.

It is undisputed that, as the district court held, respondent "has been in substantial compliance with all parameters in its NPDES permit since at least 1992." 956 F.Supp. at 611. The district court further held that in 1994 and 1995, the most recent years covered by the record, there

were only two "violations," in the amounts of 2.7 ppb and 1.4 ppb, and that these, obviously, did not exceed the permit limit of 10 ppb which would have been in effect by then but for the plaintiffs' state administrative appeal of the revised state standard. *Id.* There was likewise only one discharge in excess of 1.3 ppb in 1993, *see* 956 F. Supp. at 621, and that discharge (1.6 ppb) was likewise well below the revised standard of 10 ppb.[3]

Although the state agency had imposed a civil penalty of $100,000 in 1992, based on violations of the later-vitiated 1.3 ppb standard, and although the district court concluded that "compliance with the prior, stricter standard was not absolutely necessary to avoid environmental harm," 956 F. Supp. at 610, that court nevertheless reviewed the penalty in detail and quadrupled it to slightly over $400,000. At the same time, however, the district court was satisfied that injunctive relief was not necessary in view of the respondent's compliance. 956 F. Supp. at 611. The citizen plaintiffs did not appeal the denial of injunctive relief.

On September 1, 1998, the last discharge of any sort issued from respondent's facility. The waste disposal system at the site, including the incinerator and the waste feed systems, was removed and discarded. Respondent's decision to cease incineration (which was based on market conditions rather than the events in this case) was embodied

---

[3] The last evidence was taken in this case in July and August 1995. 956 F. Supp. at 592. The district court's order was delayed until January 1997 because of the possibility that state administrative proceedings might affect this case. *Id.*

in an agreement between the respondent and the state enforcement agency in June 1997. As a result of the closure of this plant, approximately 60 employees were terminated.[4]

SUMMARY OF ARGUMENT

Congress intended that EPA and the States would play the primary enforcement role in the protection of the nation's water ways pursuant to the Clean Water Act (CWA). That is precisely what took place in this case. Nevertheless, three individuals thereafter attempted to elevate a CWA "citizen suit" to the primary enforcement role placed in the hands of South Carolina, particularly its Department of Health and Environmental Control (DHEC). If petitioners are allowed to proceed with this case, CWA citizen suits will provide citizens and federal judges the opportunity to relitigate and second-guess the enforcement and permitting actions of South Carolina and other States, despite the *bona fide* decisions implemented in good faith by the States. Such a result will undermine the careful enforcement priorities established by Congress in the CWA as well as the role South Carolina played in regulating the facility at issue.

The State does not suggest that citizen suits are not a worthy tool for protecting the environment. In many situations, they may be the *only* tool available. On that basis, the State welcomes citizen suits as a general matter. However, Congress has decided that the federal courts

---

[4] The facts stated in this paragraph are taken from the May 21, 1999 Affidavit of Charisse G. McLeod filed in support of respondent's Suggestion of Mootness filed with this Court on June 9, 1999.

should not hear such cases under these circumstances. The record in *this* case demonstrates that *this* citizen suit was superfluous, and did not play *any* role in the enforcement of the nation's environmental laws regarding this facility. The State of South Carolina invested six years of continuous enforcement and permitting effort to ensure that the permit holder achieved stringent and unprecedented permit standards, imposed on Respondent an appropriate fine for non-compliance, received state court approval of its compliance plan and, most importantly, ensured that there was not *any* harm to the environment from any of the facility's discharges. Of critical relevance to this case, these environmental enforcement results were achieved in response to the State's actions *before the mere filing of the citizens' suit*. There can be no dispute that, in this case, the public interest in vigorously protecting the environment was well-served by the State's active enforcement role, a role not shared by the citizen suit case brought by petitioners.

South Carolina, like many other States, works within the system of environmental enforcement envisioned by Congress under the CWA. The state agency played the primary role envisioned by Congress and, through its extensive activities, ensured that no harm came to the environment. It is the States, along with EPA, that are expected to set NPDES standards, issue permits, monitor compliance and resolve non-compliance. To accomplish this role, States are vested with enormous discretion to set reasonable permit limits, negotiate resolutions to complex environmental problems at a permitted facility, determine appropriate fines and penalties and, in all events, balance the equities in determining the public interest in a particular facility's operations. It is a system that makes perfect sense.

Indeed, Congress recognized that state governments are in the best position to assess the public interest to fashion and achieve environmental goals consistent with the public interest in protecting the environment. S. Rep. No. 92-414, at 64 (1971).

Given the critical role of the States, Congress envisioned an important but much more limited role for citizen suits where, as here, the State has taken the enforcement lead. 33 U.S.C. § 1365(b)(1)(A). Appropriately, such suits essentially fill gaps left open by States which, unlike South Carolina here, choose not to carry out their enforcement role. But citizen suits were not intended by Congress to intrude on state enforcement efforts, or to second-guess enforcement decisions. That is because they supplement, rather than supplant, the State's enforcement role, as this Court noted over ten years ago. *Gwaltney v. Chesapeake Bay Foundation*, 48 U.S. 49, 60 (1987).

Where citizen suits duplicate the efforts of active state agencies, they contravene Congressional intent. In such circumstances citizen suits no longer fill gaps left open by inactive or unmindful state agencies. Instead, they mimic enforcement actions meant to be conclusive, and create an uncertainty in the enforcement arena. The result is that the State's role as the primary enforcement tool is undermined, and its approach to enforcement is no longer comprehensive, efficient or cost-effective. The state agency's exercise of enforcement discretion – including, as here, state court consent decrees and jurisdiction to enforce such decrees –is seriously hampered by subsequent federal judicial review through a citizen suit. Resolution of permit

compliance issues through negotiation and open communication with permit holders becomes much more difficult. Consequently, pragmatic solutions to environmental issues by state agencies will be frustrated. Ironically, allowing such duplicative suits to proceed results in waterways that are less protected because of the confusion created by the uncertainty in the permit-holder's eyes as to whom they must look for enforcement guidance and direction – the state agency or the federal court litigation.

Such is the case here. The citizen suit currently before the Court is the kind of duplicative, intrusive action that is inconsistent with the comprehensive scheme for environmental protection envisioned by Congress.

ARGUMENT

In this case the Court has the opportunity to clarify the circumstances under which citizens may act in an "enforcement" role regarding alleged violations of federal environmental laws. The constitutional parameters of such suits are addressed in the briefs of the parties and will not be repeated here. Instead, *amicus* suggests that, in considering these parameters, the Court should strike the appropriate balance between the benefits of allowing private citizen litigation to enforce the CWA and the strong public policy of having States serve as the primary enforcement agencies to resolve environmental pollution discharge problems. In this case, that balance favors affirming the judgment of the Court of Appeals and dismissal of the case.

I. The Role of Citizen Suits

Under the Clean Water Act is Limited.

In this case, the Court confronts a citizen suit brought *after* a state agency had invested almost six years of monitoring, investigating and cooperating with a NPDES permit-holder to select appropriate equipment to achieve stringent and unprecedented environmental standards. Two days after a state court's entry of a consent decree (which included a civil penalty consistent with its penalty policy) petitioner citizen groups filed suit complaining that the State had not "done enough" in its extensive pre-complaint enforcement role, including the imposition of the $100,000 state court civil penalty. Tacitly acknowledging that their eleventh hour attempt to obtain federal court jurisdiction might not survive under this Court's decision in *Gwaltney*, petitioners alleged that the state court consent decree and $100,000 civil penalty somehow reflected a collusive and fraudulent act by the State and respondent. As expressly found by the trial court, however, there was no basis for these charges. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 890 F.Supp. 470, 489 n.14 (D.S.C. 1995).

The Clean Water Act provides that private citizens may commence civil actions against a person who is alleged to be in violation of the conditions of a federal or state NPDES permit. 33 U.S.C. § 1365(a)(1). At the same time, however, there are important limitations on the rights of citizens to bring such suits. Both Congress and the Court have made clear that citizen suits *cannot* be brought (1) where the State (or EPA) is "diligently prosecuting" a civil or criminal action against the same permit holder (33 U.S.C. §§ 1365(b)(1)(B)), or (2) the citizens seek to remedy

violations cured by the time the suit is brought. *Gwaltney v. Chesapeake Bay Foundation*, 48 U.S. 49 (1987). More recently, in a case brought under a similar environmental statute (the Emergency Planning and Community Right-To-Know Act of 1986), the Court held that citizens do not have Article III standing to pursue civil penalties payable to the United States Treasury. *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003 (1998). Such civil penalties were awarded by the trial court in this case, which as noted below, denied all injunctive relief to petitioners.

The Court first noted in *Gwaltney* that Congress intended citizen suits to proceed under the Clean Water Act *only* if "brought to enjoin or otherwise abate an ongoing violation." 484 U.S. at 59. *Gwaltney* made clear that "the citizen suit is meant to supplement rather than supplant governmental action." *Id.* at 60. The Court found support for its holding in the legislative history of the CWA, which demonstrates that States were to be the primary enforcers of the statute:

> The Senate Report noted that "the Committee intends the great volume of enforcement actions [to] be brought by the State," and that citizen suits are proper only "if the Federal, State, and local agencies fail to exercise their enforcement responsibility."

Id. at 60 (quoting S. Rep. No. 92-414, p. 64 (1971), *reprinted in* 2A Legislative History of the Water Pollution Control Amendments of 1972, p. 1482 (1973)).

Given the unmistakable intent of Congress, the Court

cautioned that citizen suits should not interfere with the exercise of discretion by agencies entrusted with oversight of environmental compliance:

> Suppose . . . that the Administrator [of the EPA] agreed not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take. If citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest, would be curtailed considerably. The same might be said of the discretion of state enforcement authorities. Respondents' interpretation of the scope of the citizen suit would change the nature of the citizens' role from interstitial to potentially intrusive. We cannot agree that Congress intended such a result.

Id. at 60-61. The record in *Friends of the Earth* presents in concrete terms the hypothetical concern first raised in *Gwaltney*. That record makes clear that this case should never have been allowed to proceed.

II. The State of South Carolina, Not the Citizen Suit, Played The Pivotal Enforcement Role.

A. History of State Agency Enforcement

The trial court allowed petitioners to pursue injunctive relief *and* civil penalties for technical violations by the NPDES permit-holder that had been the subject of extensive state enforcement proceedings and two consent decrees long before the citizen suit was filed. The September 1988 consent decree was the culmination of almost three years of state agency investigation, monitoring and negotiation with the NPDES permit-holder. During that time, the state agency imposed on Respondent a NPDES permit with a mercury limit far more stringent than for its predecessor – a reduction from 20 parts per billion (ppb) to 1.3 ppb for mercury.[5] 956 F. Supp. 588, 593 (D.S.C. 1997). Nonetheless, under the State's watchful eye, Respondent installed two different mercury reduction systems, and tested three others. By March 1991 these technical measures met the NPDES standard mandated by the State for all parameters except mercury. *Id.* at 594-95.[6] Accordingly, in early 1992, state officials began the initiation of an enforcement proceeding for the continuing mercury exceedances under the exacting standard. By June 9, 1992, the State and Respondent had resolved their differences in a consent agreement, including imposition of a $100,000

---

[5] To put this measure in perspective, 2 ppb for mercury is allowable for drinking water. Ironically, if the facility had been new and lacked a demonstrated record of meeting a strict discharge limit, it could have obtained a NPDES permit with 200 ppb as the daily maximum discharge limit for mercury.

[6] It was a standard that one consultant characterized as an "'extremely difficult and complex problem,' inasmuch as all available manufacturer's information and reliable equipment on the market demonstrated that current technology was capable of reducing mercury only down to a range of 2 ppb to 5 ppb." *Id.* at 594.

fine payable to the State for the violations. On June 10, 1992, a state circuit court judge approved the settlement, retaining jurisdiction to oversee the implementation of the decree. *Id.* at 595.

B. Commencement of the Citizen Suit

The long-term involvement of the State ultimately resulted in a meaningful method for resolving all the pollution discharge problems. In fact, the trial court held that the facility was in "substantial compliance" with its NPDES permit requirements by March 1991 and was in complete compliance by October 1992. With these facts in mind, the citizen groups could not play any meaningful role in the enforcement process under the CWA and *Gwaltney*. However, on June 12, 1992, only two days after the entry of the second consent decree – in which the state court had taken jurisdiction over this very matter -- petitioners commenced a CWA lawsuit.

C. The Trial Court Refuses to Dismiss the Complaint

Given the administrative and state court history, Respondent moved to dismiss the complaint under Section 505(b)(1)(B) of the CWA (33 U.S.C. § 1365(b)(1)(B)) because the State of South Carolina had "diligently prosecuted" the issue of its permit compliance. According to the trial court, the issue raised by Respondent "involve[d] a delicate balance between the Act's preference for governmental enforcement efforts and the recognized policy of allowing citizens to participate in the enforcement process." 890 F. Supp. 470, 489 (D.S.C. 1995). In what

appears to have been a fundamental error, the trial court looked to EPA civil penalty policies as its "diligence yardstick." [7] It is the EPA's policy that civil penalties must recover at least the amount of the permit holder's "economic benefit" of non-compliance. *Id.* at 493. On that basis, the trial court determined

> that because recoupment of a violator's economic benefit of noncompliance is central to the enforcement of the CWA, the failure of the state enforcement agency to recover, or even to determine, a violator's economic benefit is strong evidence that the agency's prosecution of that violator was not diligent .
> . . .

Id. at 497.

On that basis, the trial court refused to dismiss the case.[8]

---

[7] "State enforcement programs are not required to be identical to the federal program." Environmental Law Handbook, T.F.P. Sullivan at 151. In formulating the civil penalty amount here, DHEC considered possible economic benefit to the respondent. See Trial Testimony of Robert R. Knaus, DHEC enforcement staff, Bureau of Water Pollution Control, Volume I, October 26, 1993.

[8] To its credit, however, the trial court recognized that it was reading a new requirement into the CWA that could well disturb the State's role as the primary enforcement actor:

> The court agrees that no language in the CWA directly requires a state enforcement agency to calculate economic benefit when determining what an appropriate civil penalty should be. In other words,

The trial court's new requirement thus elevated the citizen suit to a status equal to the State of South Carolina's enforcement activities, even though, as the trial court acknowledged, "[d]eference to governmental enforcement agencies is appropriate because the CWA delegates the primary enforcement responsibility to designated state and federal agencies." *Id.* at 487.[9]

> the CWA does not require states to replicate standards or procedures for assessing penalties under the state's water pollution control laws.

Id. at 494.

[9] A number of other cases hold that the federal courts should not entertain citizen suits in which the plaintiffs merely seek *additional* civil penalties above and beyond those imposed in the state court proceedings. *Conn. Fund for Environment v. Contract Plating Co.*, 631 F.Supp 1291, 1293 (D. Conn. 1986). *See also Arkansas Wildlife Fed'n v. ICI Americas Inc.*, 842 F. Supp. 1140, 1147 (E.D. Ark. 1993), *aff'd*, 29 F.3d 376 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1094 (1995) ("the state [enforcement] agency must be given great deference to proceed in the manner it considers in the best interests of all parties involved"); *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.*, 777 F. Supp. 173, 179, 186 (D. Conn. 1991), *aff'd in part and rev'd in part*, 989 F.2d 1305 (2d Cir. 1993) (limitations on citizen suits "allow for smoother operation of ordinary enforcement mechanisms" and encourage out-of-court settlements between agencies and polluters). *Cf. Supporters To Oppose Pollution, Inc. v. Heritage Group*, 973 F.2d 1320, 1324 (7th Cir. 1992) (Resource Conservation and Recovery Act (RCRA) suit: "An Administrator unable to make concessions is unable to obtain them. A private plaintiff waiting in the wings then is the captain of the litigation. . . . To say . . . that the EPA is not 'diligently prosecuting' the action if it does not sue the person, or use the theories, the plaintiff prefers would strip the EPA of the control the statute provides.").

The trial court's reasoning pulled the rug out from under the State of South Carolina's good faith enforcement efforts here, and left open to federal judicial review every state compliance decision. Under this reasoning, there always will be *someone* to complain that the penalty imposed by a state agency or court was "insufficient." As acknowledged by the trial court here, the "determination of economic benefit is susceptible to several different methods of calculation." *Id.* at 497. *See also PIRG v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 80 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991) ("Precise economic benefit to a polluter may be difficult to prove."). Calculating the amount of a civil penalty -- and the myriad of other enforcement decisions that arise during the administrative process -- necessarily involves the exercise of discretion that is appropriately left to state agencies. Where, as here, there was no evidence of untoward conduct or bad faith, the State's judgment as to the appropriate state court penalty and administrative technical solutions to the equipment problems should not be subjected to federal judicial review operating under "20-20 hindsight."

D. The Trial Court Denied Injunctive Relief, But Imposed Additional Civil Penalties

The trial court's decision to allow the case to proceed notwithstanding the State's enforcement role resulted in five years of pointless litigation. Ironically, the trial court ultimately denied petitioners' request for injunctive relief but assessed $405,800 in civil penalties *in addition to the $100,000 fine previously imposed by the state court consent decree*. *Id.* at 612. All those years of litigation occurred despite findings that Respondent's compliance record was

satisfactory, and that the State had properly and fully performed its enforcement role under the CWA. Specifically, the trial court found that

> Laidlaw has been in substantial compliance with all parameters in its NPDES permit since at least August 1992. . . . In fact, Laidlaw has been in compliance with the vast majority of its permit requirements for a much longer period of time, extending back to March 1991 when the Lancy [mercury reduction] system was installed.

Id. at 611.

Critical to the issues before this Court, the trial court found that the state Department of Health and Environmental Control (DHEC) had been instrumental in achieving this commendable compliance record:

> DHEC was made aware on a continuous basis of the compliance problems Laidlaw was experiencing. An open line of communication between Laidlaw and DHEC existed throughout the time period relevant to this litigation. Further, DHEC's knowledge of these problems, its enforcement efforts with respect thereto, and the agency's continued involvement with Laidlaw in achieving a solution to these problems have resulted in Laidlaw's ultimate compliance with its NPDES permit over an extended period of

> time.

Id. at 602.

Because of the good compliance record and the lack of demonstrated harm to the environment, the trial court denied injunctive relief in all respects. Nonetheless, it increased the civil penalty assessed by the State, thereby second-guessing the state agency's enforcement decisions. According to the trial court, the state penalty was "not enough" of a penalty based solely on the amount of the state court consent decree. That decision represents a wholesale repudiation of the State's enforcement role. Moreover, it also became unnecessary in light of the Court's subsequent decision in *Steel Co.*

E. Reversal by the Court of Appeals

Based on the trial court's ultimate findings after trial, petitioner's case for injunctive relief was substantially moot by June 1992 and certainly completely moot two months later -- entirely as a result of the enforcement efforts of the State. The Court of Appeals properly applied *Steel Co.* to the civil penalty portion of the case and had little trouble dismissing the rest of the case as moot where petitioners had abandoned their injunction case on appeal.

The finding of mootness was well grounded, and certainly can be affirmed for a variety of reasons found in the record. As the trial court found, Respondent was in compliance with "the vast majority" of its permit requirements by March 1991 and with "all" its permit

requirements by August 1992. 956 F. Supp. at 611. Furthermore, most of the pre-1992 permit exceedances occurred while respondent -- with the State's knowledge and under its supervision -- experimented with various technologies to bring its plant into compliance. *Id.* at 600. It was not surprising then that only nine isolated permit exceedances occurred between June and August 1992, since the State already had put in motion the measures necessary to cure the technical discharge problems. *Id.* Those exceedances likewise occurred during a period of experimentation with various operational systems following the state court's entry of the first consent decree. Those experiments eventually achieved a solution that met the 1.3 ppb mercury limit in the NPDES permit. *Id.* at 595. Thus, the State's enforcement activity clearly resolved any type of CWA problem that petitioners might have theoretically alleged in their complaint, and certainly made unnecessary at the very outset of the federal case the need for the injunction sought by petitioners.

Finally, as noted in Respondent's Rule 21 Motion pending before this Court, continuing state enforcement activities have made the citizen suit even more superfluous. Pursuant to a June 2, 1997 consent agreement with DHEC, Respondent agreed to close the operations of the South Carolina facility at issue based on economic reasons relating to the hazardous waste incineration market and not this case. Accordingly, the plant has not made any discharges under its NPDES permit since September 1, 1998, nor has it received any waste from which to generate discharges. Indeed, the incinerator that generated the plant's effluent discharges has been removed, and the plant put up for sale. The state

environmental agency has overseen this closure process, and petitioners' suit has had no impact on this closure process in any manner. Simply put, this particular citizen suit has been and remains a pointless exercise of federal court litigation.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

CHARLES M. CONDON
Attorney General for the
State of South Carolina

KENNETH P. WOODINGTON
Counsel of Record
Senior Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3680

Counsel for Amicus Curiae, State of South Carolina

July 19, 1999